

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

EARL H. SIMMONS,	:	C.A. No. S09C-07-025 RFS
Plaintiff,	:	
v.	:	
KAREN V. TRUITT AND	:	
WILLIAM E. TRUITT,	:	
Defendants.	:	

ORDER ON MOTION TO PROCEED *IN FORMA PAUPERIS*
AND UPON REVIEW OF COMPLAINT

1) Plaintiff Earl H. Simmons (“plaintiff”) has filed a complaint against Karen V. Truitt and William E. Truitt alleging what appear to be claims for malicious prosecution, defamation, and false imprisonment. He also has filed a motion to proceed *in forma pauperis*. I consider the motion and review the complaint pursuant to 10 *Del. C.*, ch. 88. Set forth below are the pertinent facts, some of which this Court takes judicial notice pursuant to Delaware Rules of Evidence, Rule 201.

2) In December, 2007, a warrant was issued for plaintiff’s arrest on a charge of assault in the third degree, intentionally or recklessly causing physical injury to another in violation of 11 *Del. C.* § 611. *State v. Simmons*, Def. ID# 0712005157. A Delaware State Trooper provided the

affidavit of probable cause. The warrant, which a Justice of the Peace issued, alleged as follows:

Earl H. Simmons, on or about the 2nd day of December, 2007, in the County of Sussex, State of Delaware, did intentionally or recklessly cause physical injury to Karen Truitt by grabbing V1's left wrist two times and causing a sprain.

Plaintiff was arrested on this warrant on December 15, 2007. On April 2, 2008, plaintiff pled *nolo contendere* to this charge in the Court of Common Pleas in and for Sussex County ("Sussex CCP"). On June 10, 2009, Sussex CCP granted plaintiff's motion to withdraw the plea. On August 13, 2008, the State of Delaware ("the State") entered a *nolle prosequi* on the charge.

An order providing that Plaintiff was to have no contact with Karen Truitt was in place during the period this criminal action was pending.

3) On January 25, 2008, a little over a month after being arrested on the criminal charge and while the no contact order was pending, plaintiff filed a civil suit in New Castle County CCP ("NCC CCP") against Karen Truitt alleging that Karen Truitt made false allegations against him to the Delaware State Trooper and sought damages in the amount of \$50,000.00. *Simmons v. Truitt*, NCC CCP, C.A. No. 08-01-566. NCC CCP denied plaintiff his motion to proceed *in forma pauperis*. The NCC CCP complaint against Karen Truitt was pending at the time plaintiff filed this suit against Karen Truitt asserting the same claim.¹

4) On February 27, 2008, Karen Truitt reported to the police that plaintiff, in violation of the no contact order entered in *State v. Simmons*, Def. ID# 0712005157, had sent faxed messages to her place of employment which requested that she stop the criminal proceedings. Plaintiff also sent a copy of the civil case information sheet regarding the NCC CCP civil suit and stated that

¹The NCC CCP case may now have been dismissed since NCC CCP has provided plaintiff notice that NCC CCP will dismiss the complaint unless plaintiff pays a filing fee and prosecutes the matter. CCP Civ. R. 41(e).

he not only intended to pursue the civil case but also intended to file criminal complaints against Karen Truitt if the civil suits ends up “non positive”. A warrant was issued for plaintiff’s arrest on a charge of breach of release in violation of 11 *Del. C. § 2113. State v. Simmons*, Def. ID# 0802034624. The warrant, which a Justice of the Peace approved, alleged:

Earl H. Simmons, on or about the 16th day of February, 2008, in the County of Sussex, State of Delaware, did knowingly and unlawfully fail to comply with a Judge’s order to wit: by having information faxed to PC1 Karen Truitt’s place of work which was clearly intended to be received by her and referenced relevant facts particular to the criminal complaint in which PC1 was the victim and S1 Earl Simmons was the suspect.

Plaintiff was arrested on this warrant on March 24, 2008. The State ultimately *nolle prossed* the charge on April 2, 2008, the date when plaintiff entered a *nolo contendere* plea to the assault charge.

5) On March 4, 2008, Karen Truitt reported to police that plaintiff had been to her house in violation of the no contact order. A warrant was issued for plaintiff’s arrest on a charge of breach of release in violation of 11 *Del. C. § 2113. State v. Simmons*, Def. ID# 0803005566. The warrant, which a Justice of the Peace approved, alleged:

Earl Simmons, on or about the 4th day of March, 2008, in the County of Sussex, State of Delaware, did knowingly and unlawfully fail to comply with a Judge’s order to wit: suspect violated a no contact order by driving to the victim’s residence/place of employment.

Plaintiff was arrested on this charge on March 24, 2008. On April 2, 2008, the State *nolle prossed* this charge, the date when plaintiff pled *nolo contendere* to the assault charge.

6) On February 10, 2009, this Court entered an order in the case of *Simmons v. Smith*, Del. Super., C.A. No. S08C-12-027, Graves, J. (Feb. 10, 2009), which provided as follows:

1) Plaintiff Earl Simmons (“plaintiff”) filed a complaint in this matter and

a motion to proceed *in forma pauperis*.

2) In the complaint, plaintiff seeks relief on behalf of his company, Jet International Company. Plaintiff failed to provide information as to whether Jet International Company was incorporated and he failed to provide any information in his motion to proceed *in forma pauperis* regarding his interest in that company.

3) In an order dated January 14, 2009, this Court directed that plaintiff file information so that the Court could determine two things. First, it needed to determine whether plaintiff had more income or assets than he listed in his motion to proceed *in forma pauperis*. Second, it needed to determine whether Jet International Company was incorporated and consequently, must be represented by an attorney.

4) The Court directed plaintiff to file this information by February 6, 2009, or risk dismissal of the action. Plaintiff failed to file the required information.

NOW, THEREFORE, THIS 10th DAY OF FEBRUARY, 2009, IT IS
HEREBY ORDERED AS FOLLOWS:

1) Plaintiff's motion to proceed *in forma pauperis* is DENIED.

2) Plaintiff will not be allowed to proceed *in forma pauperis* in the Superior Court in this action or in any future action until he provides information establishing what interest he has in Jet International Company, setting forth the earnings and debt of the company and providing tax documents filed for the company within three years of January 14, 2009.

3) Because plaintiff has not complied with the Court's directive, the Court cannot tell if Jet International is incorporated. If it is, then it must be represented by counsel. Plaintiff cannot pursue an action on behalf of an incorporated business. Thus, the complaint is DISMISSED.

7) On July 16, 2009, plaintiff filed the complaint in this action and a motion to proceed *in forma pauperis*.

8) In the complaint filed with Superior Court, plaintiff alleges the following. He was arrested on Karen Truitt's complaint for "offensive touching". (As noted earlier, the charge was assault in the third degree.) Later, she had him arrested for two incidents of breach of release. As a result of these charges, he was incarcerated and while incarcerated, he fell and suffered personal injuries for which he incurred medical expenses. No jury appeared in Sussex CCP and that court dismissed all the cases. (Plaintiff omits the fact that he entered a plea of *nolo contendere* on the assault charge and thereafter, withdrew that plea.) Plaintiff does not set forth

any facts against William E. Truitt. He then generally alleges:

Based on above facts, I am suing the Truitts ... of the sum of \$25,000,000 for false info. givin [sic] DSP, causing irreparable harm, 13 days false imprisonment in (2) Delawere [sic] jails, acting maliciously, giving libelous statements to DSP + causing physical/mental harm.

9) In submitting his motion to proceed *in forma pauperis*, plaintiff failed to provide the information he was instructed to submit pursuant to the February 10, 2009, order in *Simmons v. Smith, supra*. Consequently, this Court refused to consider plaintiff's motion to proceed *in forma pauperis* until plaintiff provided information establishing what interest he has in Jet International Company, setting forth the earnings and debts of the company, and providing tax documents filed for the company within three years of January 14, 2009. Thereafter, plaintiff provided an unsworn statement wherein he explained the following. He was the President and Chief Executive Officer and founder of start-up companies Jet International Air Travel, Inc. and Jet International Exec. LLC. He was unable to obtain funding for either company, has no employees, and has not earned any money from these companies.

Plaintiff has not filed the tax documents required by the February 10, 2009, order and the motion to proceed *in forma pauperis* is denied for that reason.

10) In connection with the consideration of the motion to proceed *in forma pauperis*, this Court has reviewed the complaint pursuant to 10 *Del. C.* § 8803(b). The Court dismisses the complaint for two reasons.

11) First, the complaint is malicious.

Immediately after being arrested, plaintiff filed a lawsuit in NCC CCP against Karen Truitt and, in defiance of a no contact order, contacted her and attempted to use this lawsuit as

leverage against her regarding the criminal suit. The lawsuit he now has filed with Superior Court is virtually identical to the one that already was pending against Karen Truitt in NCC CCP. Plaintiff failed to inform this Court that another lawsuit was pending in another court seeking the same relief.

Plaintiff has four arrests on his criminal history for the charge of harassment. He also has three arrests, two of which were noted above, for non-compliance with a bond. A harassment proceeding currently is pending against plaintiff involving another party. *State v. Simmons*, Def. ID# 0906009537. The affidavit of probable cause in that case explains that plaintiff threatened to file a civil suit against the victim and his office for defamation of character.

Plaintiff's criminal history is significant because it shows that plaintiff has been arrested multiple times for harassment and for refusing to leave a victim alone despite being ordered to do so, and it shows a pattern of threatening his victims with civil suits whenever they have him arrested.

I conclude that this suit is just another form of harassment against Karen Truitt. The complaint is dismissed with prejudice as being malicious. 10 *Del. C.* § 8803(b).

12) Second, the complaint fails to state a claim upon which relief may be granted.

Although plaintiff does not specifically state it, he is asserting a claim of malicious prosecution. In order to state a claim for malicious prosecution, he must allege essential elements of malicious prosecution, one of which is that the defendants lacked probable cause to initiate the criminal proceedings, and another that defendants' institution of the criminal proceedings was malicious. *Stidham v. Diamond State Brewery, Inc.*, 21 A.2d 283, 284 (Del. Super. 1941). Plaintiff has not made any factual allegations against defendants asserting that no probable cause

existed, **at the time of the initiation of the criminal proceedings**, for the charges against him.² Furthermore, he has failed to assert any factual basis for a claim of malice. *Read v. Carpenter*, 1995 WL 945544, * 2 (Del. Super. June 8, 1995), *rearg. den.*, 1995 WL 945548 (Del. Super. June 23, 1995), *aff. of den. of rearg.*, 670 A.2d 1340 (Del. 1995). Because he has failed to allege essential elements of the claim of malicious prosecution, that claim is dismissed for failure to state a claim.

Plaintiff also appears to be alleging a defamation claim. Although he states the defendants made “libelous statements”, he actually means slanderous statements. Libel is written defamation while slander is spoken defamation. *Read v. Carpenter, supra*.

Plaintiff is required to plead five elements:

1) the defamatory character of the communication; 2) publication; 3) that the communication refers to the plaintiff; 4) the third party’s understanding of the communication’s defamatory character; and 5) injury.

Id. Plaintiff has failed to plead these elements, and thus, this claim is dismissed for failure to state a claim upon which relief may be granted.

Finally, plaintiff appears to be asserting a claim of false imprisonment. As the Superior Court explained in *Shaffer v. Davis*, 1990 WL 81892, * 2 (Del. Super. June 12, 1990):

The private citizen who instigates a criminal prosecution is not subject to a suit for false arrest or false imprisonment unless he actively participated in the service of the warrant in the criminal prosecution he has instigated. ...

²As explained in *Goode v. Kimbro*, 2009 WL 693256, * 4 (Del. Super. March 4, 2009):

A Magistrate Judge’s issuance of a warrant is *prima facie* evidence that probable cause exists. Entrance of a *nollo prosequi* or acquittal is not sufficient to overcome the *prima facie* probable cause. Further, probable cause is determined at the inception of the action, not its termination. [Footnotes and citations omitted].

In this case, there is no allegation that the defendants actively participated in the service of any warrant. Thus, this claim must be dismissed for failure to state a claim.

Based on the foregoing, plaintiff has failed to state a claim upon which relief may be granted.

13) In conclusion, plaintiff's motion to proceed *in forma pauperis* is DENIED, and the complaint is DISMISSED as being malicious and for failure to state a claim.

IT IS SO ORDERED THIS 20TH DAY OF OCTOBER, 2009.

Richard F. Stokes, JUDGE

cc: Prothonotary's Office
Earl Simmons